No. 283.
Brf. of Leighton for Appellees.
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JAMES H. McKENNEY,

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JOHN B. WIGHT ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

CHARLES H. DAVIDSON ET AL., APPELLEES.

BRIEF FOR APPELLEES.

B. F. LEIGHTON,
Attorney for Appellees.

LAW REPORTER PRINT.

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STATEMENT OF THE CASE.

By act of Congress approved March 3, 1899, it was enacted, among other things, that within thirty days from the passage of the act, the Commissioners of the District of Columbia were directed to institute in the Supreme Court of the District of Columbia a proceeding to condemn the necessary land to open and extend S, Twenty-second, and Decatur streets, through lots forty-one (41) and forty-two (42) of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, being part of "Widow's Mite"; provided—

> "That the owners of the 'Kall' tract dedicate the land in said tract contained within the lines of said streets; *and provided further*, That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, *not less than one-half thereof* shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said

> streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

Section 5 of said act provided that the proceedings for condemnation of said land should be under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia. By section 7 of said act it was provided:

> "That the sums to be assessed against each lot and parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of said lots, and the benefits that they may severally receive from the opening of said streets. When the use of a part only of any piece or parcel of ground shall be condemned, the jury, in determining its value, shall not take into consideration any benefits that may accrue to the remainder theoeof from the opening of said streets or highways, but such benefits shall be considered in determining what assessment shall be made on or against that part of such lot as is not taken."

The eighth section of said act provides that on the confirmation of said assessments by the court, they shall constitute a lien upon the land assessed, and be collected as special improvement taxes in the District of Columbia are collected. Said section contains a proviso—

> "That no appeal by any interested party from any decision of the Supreme Court of the District of Columbia confirming said assessment or assessments, shall delay or prevent the payment of said awards in respect to the property condemned."

Under the provisions of this act the Commissioners of the District of Columbia, on or about March 31, 1899, filed a petition in the Supreme Court of the District of Columbia,

sitting as a District Court of the United States for said District, seeking to condemn the land necessary to extend S, Twenty-second, and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, in accordance with the provisions of chapter 11 of the Revised Statutes of the United States relating to said District.

Said petition averred that the owners of the Kall tract had dedicated to the District of Columbia, for highway purposes, the land in said tract contained within the lines of S, Twenty-second, and Decatur streets. A copy of a map showing the proposed extension of said streets was appended as an exhibit to said petition, and is found in the record, after the petition in this case. Said petition also sets out the provisions of said act of Congress relating to the assessment of one-half the damages awarded against the parcels or lots of ground lying on each side of the extension of said streets and the adjacent property benefited by the opening thereof, and concludes with a prayer for process, and such further orders and proceedings in the premises as were contemplated by the act of Congress authorizing the condemnation.

On the 3d day of April, 1899, the court below passed an order reciting the substance of said petition and its purport, and directing that all persons interested in said proceedings should appear in said court on or before the day of said month, and show cause, if any they had, why the prayer of said petition should not be taken; provided a copy of said order be published in the Washington Post and the Washington Times newspapers at least six times, and in The Washington Law Reporter once, before said 22d day of April, 1899. Due proof of the publication of said order, as directed by the terms thereof, appears to have been made. Thereafter the court passed an order directing the marshal to summon a jury as prayed in said petition, and directing them to assess not less than one-half of the amount found

due and awarded as damages, against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which should be benefited by the opening thereof.

Thereafter, on August 30th of said year, the jury returned their verdict in the case. In their verdict, among other things, the jury stated that W. Riley Deeble, Esq., represented the Kall tract; that he also was examined as a witness on behalf of the petitioners. Mr. Leroy Tuttle, whose land was sought to be condemned by these proceedings, was personally served with process. Appellants were not served with process. They had no notice of the proceedings other than that implied from the order of publication passed in said cause, as hereinbefore set out. The statement in the verdict of the jury that appellants were represented by W. Riley Deeble, Esq., is an inadvertence, as will appear by the affidavit of the said Deeble filed in said cause, and also the affidavit of John C. Davidson, Esq. (Rec., pp. 16, 17).

The jury awarded damages to Mr. Leroy Tuttle for the land sought to be taken by these proceedings, in the sum of $52,000; one-half of this sum, or $26,000, they assessed against the land of Mr. Tuttle adjacent to the streets to be opened, and other land in the vicinity, which they assume to have been benefited by the opening of said streets; of the sum of $26,000, $14,000 was assessed against the Kall tract, belonging to appellants. On September 19, 1889, the court passed an order *nisi* confirming said verdict, award and assessment of benefits, unless cause to the contrary were shown on or before the 4th day of the following month. It was further ordered that the marshal serve a copy of the order *nisi* on the owners of the land condemned, and the owners of the land assessed in said verdict. In pursuance of this order, appellants were served with a copy of said order *nisi*.

On the 4th day of October, 1899, appellants filed exceptions to the confirmation of the award, and finding of the jury in this cause, as the owners of a tract of land known and described in said proceedings as the Kall tract.

These exceptions are in the following language, to wit:

> "Now come the respondents, Charles H. Davidson and Albert A. Wilson and John B. Larner, trustees, and except and object to the confirmation of the award and finding of the jury in respect to that tract or parcel of land situate in the county of Washington, District of Columbia, known as the Kall tract, and as more particularly described in the petition and proceedings in this cause, to which reference is hereby made, and to the assessment of damages made by said jury in respect to each and every part and parcel of said tract, because they say:
>
> "First. Said award of damages and finding of the jury is not warranted by the statute under which these proceedings were had and taken, and by a proper construction thereof no damages can be assessed against said tract of land or any part thereof, or these respondents as owners of said land.
>
> "Second. Because said act is unconstitutional and void, in that it contains no provision for notifying the owners of property to be assessed in advance of said assessment, nor at any time pending the consideration of the cause by the jury, nor is any mode designated by the statute by which the objections of the owners whose land is sought to be charged with benefits can be properly heard or considered, or by which any objection they may have to such assessment might be made effective, and for other vices and defects apparent upon the face of the statute.
>
> "Third. Because the statute under which said assessment is made is a statute relating to the condemnation of land solely, and contains no provision touching the assessment of benefits, and was not intended to provide for such assessment.
>
> "Fourth. Because the statute authorizing the extension of said streets, and the condemnation of land

therefor and the assessment of benefits is, when taken in connection with the statute under which the condemnation proceedings were to be conducted, inconsistent and incapable of enforcement as to the assessment of benefits against property forming no part of that sort to be condemned.

"Fifth. Because the description of the property sought to be charged with the assessment of benefits is inaccurate, insufficient and defective.

"Sixth. Because said award of damages and finding of the jury in that behalf is excessive, unjust, and unreasonable.

"These respondents, therefore, each and severally request and demand said award and finding to be set aside, and that a new jury be impanelled in accordance with the provision of the statute in such case made and provided."

Thereafter, on the 9th of October, 1899, the petitioners in said cause moved for a final confirmation of the verdict, award and assessments, notwithstanding the objections thereto. On the 18th day of November following, the court passed a decree overruling said exceptions, and confirming in all respects the verdict of award and assessments so made by said jury, as aforesaid. From this order of confirmation appellants appealed to the Court of Appeals of the District of Columbia.

Upon hearing, the Court of Appeals reversed the court below, and held—

First. That the act under which the condemnation proceedings were had and taken was unconstitutional and void.

Second. That the notice given in this case to the appellees was not such as the law required, and was insufficient to bring the appellees properly before the court, and that the assessment was void on that account.

The case was brought by appeal to this court.

I.

The act upon which the proceedings in this case are based is unconstitutional, because it arbitrarily fixes the amount of benefits to be assessed upon the property, irrespective of the amount of benefits actually received or conferred upon the land assessed, by the opening of said streets.

The only theory of law, upon which the cost of land taken by the government for public highways, can be assessed, in whole or in part upon land lying in the vicinity of the streets to be opened, instead of being paid out of the public treasury, is the fact that the land assessed is specially benefited to the amount of the assessment. A statute which arbitrarily assumes that certain land in the vicinity of public improvements will be benefited in a gross sum, and does not afford the assessed owner at some time during the progress of the assessment, and before its enforcement, an opportunity to be heard upon the question of fact, as to whether or not the benefit conferred upon the property is equal to the burden imposed, is unconstitutional.

In the now famous case of Norwood *vs.* Baker, Mr. Justice Harlan, speaking for the majority of the court, said:

> "The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement."

And, continuing, said:

> "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is, *to the extent of such excess*, a taking under the guise of taxation, of private property for public use without compensation."
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> 172 U. S. 278, 279.

This case, also, by necessary implication, establishes the principle that the power to determine whether a particular piece of property will be benefited or not, by a proposed public improvement, and to what extent, is a judicial, and not a legislative function. The village of Norwood proceeded in accordance with, and not in violation of, the provisions of the statute law of the State of Ohio.

The first section of the act of Congress under consideration, provides that of the amount found to be due, and awarded as damages for the land to be condemned, under the provisions contained in the act for the opening of said streets, not less than one-half should be assessed by the jury in said proceedings, against the parcels of land lying on each side of the extension of said streets, and also on all or any adjacent parcels of land which would be benefited by the opening thereof, as provided by the terms of said act. The statute does not declare in terms, that the land situate in the vicinity of the streets to be extended, will, as a general rule, be specially benefited, and then leave the question of what property is specially benefited, and the extent of such benefit, to be ascertained by the jury; but it arbitrarily directs the jury to assess at least 50 per cent. of the amount awarded for damages for the land taken, to be assessed against the property lying on each side of the street to be extended, and any other adjacent land which they may find has been specially benefited. By the very terms of the act, the question as to whether or not the land to be assessed will be specially benefited, and the extent of such benefit, is withdrawn from the consideration of the jury. The amount of the award of damages for the land to be condemned, could only be known after the finding of the jury. How could Congress tell in advance of such finding, that the land in the vicinity of the streets to be extended, would certainly be benefited to the extent of at least one-half of such award? As was held by the court below:

"It is true that in the enactment in question, the legislative authority recognizes the principle that the assessment is to be made only on property benefited by the improvement, and provides that the assessment shall be made in a judicial proceeding. But it does not leave the question of special benefits to be determined in such proceeding. It arbitrarily finds for itself that the whole adjacent property subject to assessment, or intended to be assessed, will have been specially benefited to the extent at least of one-half of the cost of the improvement; and all that is left to the jury in the judicial proceeding, is, not to find the value of the special benefit to each adjacent piece of property, but to apportion at least one-half of the cost, and as much more as they may think proper, between the adjacent lots. This we think, is in direct contravention to the principle enunciated in the case of Norwood *vs.* Baker, and can not be supported as a valid exercise of legislative authority."

Since the decision in Norwood *vs.* Baker, other courts, upon similar statutes to the one now before the court, have reached the same conclusion as did the Court of Appeals of the District of Columbia, in the case at bar. In the case of Charles *vs.* The City of Marion et al., the court had under consideration, a statute providing that the entire cost of paving a street, should be assessed against the abutting property, by the front foot. The assessment in this case seems to have been made after a survey by the surveyor, reporting the cost of improvements, the average cost of running front foot, the name of the property owners, the number of front feet owned by each, and an opportunity on the part of such owners to appear and contest the correctness of the engineer's report. The decisions of the courts of the State of Indiana, where the case originated, seem to have uniformly upheld the validity of such legislation, and such method of assessment. The court, in disposing of the case, said:

"The method of assessment prescribed by the statute is in conflict with the doctrine of Village of Norwood *vs.* Baker. It is clear that the statute under which the present proceedings are prosecuted provides that the entire cost of the street improvement, except for street and alley crossings, shall be assessed against the abutting property by the frontage measurement, without any regard to the special benefits received by it. It provides for no notice and hearing to ascertain and determine the actual benefits specially received by the land owner by reason of such improvement. The only notice and hearing provided for is one to revise and correct the report and estimate of the engineer, so as to make it conformable to the basis of assessment prescribed in sections 3, 5 and 6. Such legislation is unconstitutional and void, under both the Federal and State Constitutions, because it constitutes a taking of property without just compensation, and is a denial of the equal protection of the law. Statutes substantially like the one under consideration, since the decision in Norwood *vs.* Baker, *supra*, have been held invalid by many courts, although prior to that decision the same or similar statutes had been upheld by the same courts upon the same theory upon which the legislation of this State has been upheld."

100 Fed Rep. 542.

The case of Fay et al. *vs.* City of Springfield et al., decided May 19, 1899, had under consideration a similar statute, and reached a similar result, the court closing its opinion in the following language:

"Equality is equity. And the right of the owner of a lot to have this burden of special tax ratably distributed among the lots benefitted, does not depend alone upon the State constitution exacting equal taxation, but has 'its foundation in those elementary principles of equity and justice which lie at the root of the social compact' (In re Canal Street, 11 Wend. 154–156), and he can therefore invoke for its security and protection the Federal Constitution,

> which inhibits not only the taking of private property for public use without just compensation, but the deprivation thereof without due process of law, and denies to the State the power to 'deny within its jurisdiction the equal protection of the laws.' Following what I conceive to be the ruling of the Supreme Court in the case of Norwood *vs.* Baker, the temporary injunction asked for is granted."
>
> 94 Fed. Rep. 421.

The city council of the city of Houston, State of Texas, adopted a resolution declaring the improvement of a certain public street or highway, running in front of the plaintiff's property, to be a public necessity, and directed, in pursuance of the powers vested in them by the city charter, that the cost of the improvement, together with the cost of collection, should be assessed against the plaintiff's property, abutting on said highway, except at the point where said highway was intersected by cross streets. The Court of Appeals of the State of Texas upheld the validity of the assessment. The case was brought by writ of error to the Supreme Court of Texas, and the decision of the lower court was there reversed. Justice Brown, speaking for the court, said:

> "The court of civil appeals followed strictly the case of Adams *vs.* Fisher, 75 Tex. 657: 6 S. W. 772, in which Judge Stayton said: 'The charter of the city of Galveston gives to its council the legislative power to determine whether such an improvement will be for the public interest, and also to determine whether it will be of such benefit to property fronting on that particular street to be improved as will justify the imposition of a part of the costs of the improvement on the owners of such property, and its determination of this question must be deemed conclusive,' and in support of the opinion, Judge Stayton quoted from city of Ludlow *vs.* Trustees of Cincinnati Southern Railway Co., 78 Ky. 360, as follows: 'While assessments of this character, as distinguished from general taxation, rest upon the basis

of benefits or presumed benefits to the property assessed, it is not essential to their validity that an actual enhancement in value or other benefit to the owner be shown. The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement, and of the question of benefit to the owners of abutting property.' In that opinion, the court followed the great weight of authority by which this extraordinary power has been sustained with remarkable unanimity. But in the case of Village of Norwood *vs.* Baker, 172 U. S. 269; 19 Sup. Ct. 187, recently decided by the Supreme Court of the United States, the rule announced in Adams *vs.* Fisher has been completely overturned, and all precedents establishing it have been set aside. We recognize the binding force of the decision of the Supreme Court of the United States upon this question, but we the more readily apply it because we indorse it as a timely and just announcement of the superiority of a constitutional guaranty of a rule of law established by the courts."

Hutcheson et al. *vs.* Storrie, 51 S. W. Rep. 849.

To like effect are the cases of—

Loeb *vs.* Trustees, 91 Fed. Rep. 37.

Lyon *vs.* Town of Tonawanda, 98 Fed. Rep. 361.

The case of Spencer *vs.* Merchant, cited in appellant's brief, did not decide the point now under discussion. Mr. Justice Harlan, in discussing that case, in the case of Norwood *vs.* Baker, said:

"The point raised in that case—the only point in judgment—was one relating to proper notice to the owners of the property assessed, in order that they might be heard upon the question of the equitable apportionment of the sum directed to be levied upon all of them. This appears from both the opinion and the dissenting opinion in that case."

172 U. S. 296.

That Congress possesses complete jurisdiction, both of a political and municipal nature, over the District of Columbia, as was declared in Parsons *vs.* District of Columbia, is not sought to be controverted. It may, in its discretion, take away any and all political privileges from the inhabitants of said District; it has a large, but not absolute discretion as to the form of government by which the people of the District shall be governed; but it may not lawfully deprive the people residing therein of the constitutional guarantees respecting life, liberty and property. It can not take from a private citizen thereof, his property, without due process of law. Allen *vs.* Wilson, 105 U. S. 547. Neither do the appellees controvert the proposition that the assessment must be referred to the power of taxation, and was not in the exercise of the right of eminent domain; but the power of taxation, even by the Congress of the United States, is a limited, and not an absolute power, especially when such power is exercised for the purpose of fixing special burdens upon particular individuals.

The case of Bauman *vs.* Ross is not in point, and has no application to the part of the statute under consideration, relating to the assessment of benefits. The statute before the court in that case, did not in terms, or by necessary implication, direct any particular land to be assessed. The jury were to assess land which they found to be benefited by the opening of the highways, and none other; and this court held that the taxing district, as prescribed by that statute, was co-terminus with the boundaries of the District of Columbia. Said Mr. Justice Gray, speaking for the court on this point:

> "The lands to be assessed being described generally as 'the lands benefited' by the condemnation and establishment of the new highway, or by the abandonment of an existing highway, and again as the 'property thereby benefited,' and as the lands which the jury 'find to be so benefited,' without any

> words of restriction to lands in the particular subdivision, the reasonable inference is that all lands so benefited, lying within the exclusive jurisdiction of Congress over the District of Columbia, may be included in the assessment."
>
> 167 U. S. 591.

The construction put by appellants in their brief, upon the provisions of the act relating to the assessment of benefits, is not tenable. The lands lying on each side of the streets to be extended were to be assessed, and all or any adjacent parcels of land found to be benefited by the opening of said streets.

Webster defines the word "adjacent" as follows:— "Lying near, close or contiguous, but not actually touching;" so that the taxing area in this case was limited to the lands abutting on the streets to be opened, and that lying in the immediate vicinity.

Nor has the case of Parsons *vs.* District of Columbia, 170 U. S, 45, 52, 56, any application to the statute to be construed in this case. Quoting again from the opinion in Norwood *vs.* Baker, *supra*:

> "The power conferred upon the Commissioners [in that case] was, not to make assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their *bona fide* exercise of such power can not be reviewed by the courts" (p. 294).

Without discussing or attempting to reconcile all of the cases cited by appellants in their brief, with the case of Norwood *vs.* Baker, appellees respectfully submit that the principles laid down in that case are conclusive against the validity of the statute under discussion.

II.

Said act is void because it contains no provision for notifying the owners of the property to be assessed, in advance of such assessment, or at any time pending the consideration of the cause by the jury. The proceedings under which the assessment was made do not constitute due process of law.

To constitute due process of law, the statute authorizing the assessment must contain in itself provision for notice to the parties whose property is to be assessed, either in express terms or by necessary implication; and the notice must be of such a character as to afford the parties whose interests are affected opportunity to be heard before the assessment becomes final. The hearing must be before a tribunal capable of making corrections and rectifying errors; otherwise the notice itself is vain and nugatory, and as much a violation of constitutional right as though no notice of any character were provided by law. The leading case on the subject of notice in cases of this character is that of Stuart *vs.* Palmer, 74 N. Y. 183. This was an action brought by the plaintiff against the defendant, as collector of taxes, to vacate an assessment upon plaintiff's land, as a cloud upon his title, and to restrain him from collecting the same. The act under which the alleged assessment was made contained no provision for notifying the owners when assessments were to be made. Justice Earle, speaking for the court, said:

> "I am of the opinion that the Constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. *It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing; the law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly*

apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it can not dispense with all notice.

. . . . . .

"It must be conceded that property can not be taken by the right of eminent domain, without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard, as to the compensation to be awarded him. An act of the legislature, arbitrarily taking property for the public good, and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that 'due process of law' which both Federal and State Constitutions guarantee to every citizen. Can it be, that when the public takes land for a public highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard?

"The legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property, without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these 'without due process of law,' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the legislature can not do nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but

> extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature."

The principles enunciated in this case were expressly referred to and reaffirmed in the matter of McPherson, 104 N. Y. 321, and also in the case of Remsen *vs.* Wheeler, 105 N. Y. 579. The opinion in both these cases was delivered by Justice Earle, and in so far as the principles laid down by the court in the case of Spencer *vs.* Merchant, in 100 N. Y. 586, are inconsistent with those announced in Stuart *vs.* Palmer, they must be considered as overruled by that court. It is to be observed that Justices Earle and Repallo dissented from the opinion rendered in this case, and the case itself is never afterwards cited, so far as I can discover, in the decisions of that court. This case was carried to the Supreme Court of the United States, on a writ of error, and the judgment of the court below was affirmed by a divided court, Justice Gray delivering the opinion of a majority of the court. Justices Matthews and Harlan dissented, and Justice Matthews filed a dissenting opinion, in which he said:

> "It is impossible for me, therefore, to reconcile the opinion of the Court of Appeals of New York, now under review, and the opinion of the same court in Stuart *vs.* Palmer. The same objection applies to both statutes with equal force. As I think the Court of Appeals was right in its judgment upon the first statute, I am of the opinion that its judgment upon the act of 1881, involved in this writ of error, should be reversed."

In the case of San Mateo *vs.* Southern Pacific RR. Co., 13 Fed. Rep. 722, one of the questions before the court was as to whether an assessment was valid which was made under a law which did not provide for notice to the owner in a case where the Constitution was silent on that subject. Justice Field, in the course of his opinion said:

"There being then no provision of law giving to the company notice of the action of the state board, and an opportunity to be heard respecting it, is the assessment valid? Would the taking of the company's property in the enforcement of the tax levied according to the assessment, be depriving it of its property without due process of law? It seems to us there can be but one answer to these questions. There is something repugnant to all notions of justice in the doctrine that any body of men can be clothed with the power of finally determining the value of another's property, according to which it may be taxed, without affording to him an opportunity of being heard respecting the correctness of their action. And the injustice is strikingly apparent when the property consists of the great number of particulars which go to make up the taxable estate of a railroad company, requiring for any just estimate of their value, accurate knowledge upon a multitude of subjects, not usually possessed without special study. We can not assent to any such doctrine. It conflicts with the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty or his property without an opportunity of being heard against the proceeding. It is significant that the guaranty against the deprivation of property without due process of law is contained in the clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the securities applicable to the case recognized by the general law, by those principles which are established in all constitutional governments for the protection of private rights. *Notice is absolutely essential to the validity of the proceeding in any case; it may be given by personal citation, and in some cases it may be given by statute; but given it must be in some form.* Notice to him (the owner) will be deemed sufficient, if the time and place of hearing be designated by statute. But whatever the character of the proceeding—whether judicial or administrative, summary or protracted, and whether it takes property directly or

> creates a charge or liability which may be the basis of taking it—the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority, absolutely overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

In this connection, the court quotes extensively from Stuart *vs.* Palmer, *supra*, and gives to the principles therein announced, its express approbation.

In the case of Brown *vs.* City of Denver, the court had under consideration the validity of an ordinance of the city of Denver, known as the "Sidewalk Ordinance." It required lot owners to construct sidewalks at their own expense, in front of their lots. The publication of the ordinance, itself, was, by the terms of the ordinance, to constitute notice to the owners, and was the only provision respecting notice found in the ordinance. The validity of the ordinance was attacked, on the ground that it was in violation of section 1, article 14, of the Amendments to the Constitution of the United States, as well as in violation of the State Constitution. The court held the ordinance to be in violation of both the Federal and State Constitutions. On the subject of notice, it said:

> "But when the validity of a law or ordinance is questioned upon the ground that it authorizes the taking of property without such notice or hearing, the objection is not obviated by proof that a hearing has been had, as a matter of favor, in the case. Nor does it satisfy the constitutional requirements that the assessment is fair and just. A valid assessment can not be made under an invalid law or ordinance, and its constitutionality is to be tested not by what has been done under it, but by what it authorizes to be done by virtue of its provisions."

7 Colorado, 312.

In this case the court cited the case of Stuart *vs.* Palmer, *supra*, and numerous other cases, in support of its contention.

In the case of The Mayor, etc., of Baltimore *vs.* Scharf, one of the questions before the court was as to the validity of an ordinance passed by the city of Baltimore, providing for the repairing and recurbing of certain streets, and assessing the cost of the work to be done against the owners of the property binding on the streets to be improved. The ordinance did not make any provision for a hearing of the property owners. The court held the ordinance, on that account, to be invalid, and cited with approval the case of Stuart *vs.* Palmer, *supra*. In the course of its opinion, the court said:

> "The injustice of such legislation is glaring. It is not only unjust; it is an invasion of those rights which can not be interfered with except 'by due process of law;' and this 'due process of law' involves a day for, and an opportunity for, a hearing. This ordinance makes no provision for notice, and on the authority of adjudged cases, is invalid."
>
> 54 Md. 519.

This case was subsequently reargued, and the judgment of the court was reversed, Justices Alvey and Irving dissenting. It was reversed on the authority of The Mayor, etc., of Baltimore *vs.* Johns Hopkins Hospital, reported at page 1, 56 Md.

In the latter case Justice Alvey delivered a dissenting opinion, in the course of which he said:

> "And in regard to notice, we know of no system of taxation in which the parties affected by the assessments are not allowed, at some stage of the proceeding, an opportunity to be heard. Indeed, upon fundamental principles of right and justice, and as a guaranty of the rights of the citizen against arbitrary exactions, notice is deemed, by the courts of the

> highest authority, an essential element in the legality of all assessments, whether of ordinary taxes or for special benefits; and any mode of assessment by which it has been attempted to deny to the parties affected, the right and opportunity to be heard in their defense, has been denounced as essentially vicious, and therefore inoperative and void. Without notice, therefore, no valid assessment can be made."

In the case of Ullman *vs.* Mayor, etc., of Baltimore, reported in 72 Md. 587, the same question was before the court. The court returned to the doctrine laid down in its first opinion in Scharf's Case, and receded from and overruled the other Maryland cases in conflict with the principles therein laid down, thus placing the decision of that court in line with the views of the dissenting justice expressed in his dissenting opinion in Mayor, etc., of Baltimore *vs.* Johns Hopkins Hospital. *supra.*

So, in the well argued case of Allman *vs.* District of Columbia Justice Shepard, speaking for the court said:

> "Whilst there is a difference of opinion with respect to the stage of the proceeding at which the notice must be given, the mode and form of giving it, and the purpose thereof, there is general concurrence in the view that *reasonable notice at some serviceable stage of the proceedings is absolutely necessary to the validity of the assessment.*"
>
> 3 App. D. C. 20–1–2–3–5.

The following cases are of similar purport:

Davidson *vs.* New Orleans, 96 U. S. 97.

Santa Clara Co. *vs.* S. Pacific RR. Co., 18 Fed. Rep. 385.

Cupp *vs.* Seneca Co., 19 Ohio St. 173.

Chi. & Alton RR. *vs.* Smith, 78 Ill. 98.

Powers *vs.* Bears, 12 Wis. 245.

Mulligan *vs.* Smith, 59 Cal. 219.

Owners of Ground *vs.* Albany, 15 Wend. 375.
In re Village of Middletown, 82 N. Y. 196.
Bauman *vs.* Ross, 167 U. S. and cases cited.

All of the cases upon the subject of notice, reviewed by the court in this last case, contained an express provision for notice to the owners of the property to be assessed, and opportunity to be heard before the assessment became final.

Statutes derive their vitality and effectiveness from the legislature, and not from the courts; that is not statutory law which derives its effective energy from any other source than the legislative will.

Rice *vs.* Foster, 4 Harrington, 479.
Johnson *vs.* Rich, 9 Barb. 680.
Thorne *vs.* Cramer, 15 Barb. 112.
Barto *vs.* Himrod, 8 N. Y. 483.
Parker *vs.* Con., 6 Penna. 507.

The act of March 3, under discussion, is silent on the subject of notice. The procedure for the condemnation of land for the streets directed to be extended was to be regulated by the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia. This latter statute did not contemplate, and makes no provision for, the assessments of benefits. It relates to the condemnation of land solely. The damage awarded for the taking of the land, was to be paid out of the common treasury, and no part of it was to be assessed either on the adjoining lands belonging to those whose land was to be condemned, or upon other land in the vicinity which might be benefited by the opening of the streets. The only notice provided for by the statute was a personal notice. There was no suggestion of a notice by advertisement. The act respecting the assessment of benefits, is exactly similar to the statute before the court in the case of Stuart *vs.* Palmer, *supra.*

Appellants in this cause were not parties to the petition; they were not served with process prior to the assessment; the only notice that can in any way be assumed to have affected them or their rights, is that contained in the order of the court of April 3, 1899, warning all persons interested in the proceedings to appear in court, on the day named, to show cause why the prayer of said petition should not be granted. This order was based upon no statutory authority, and is, for that reason, simply void.

For a like reason, the order of the court of September 19, 1899, directing personal service of the verdict of the jury assessing the appellants' land, to be served upon them, is void and nugatory. Had the statute expressly provided for service of personal notice, at this stage of the proceedings, and under the conditions existing in this case, it would have failed to have imparted validity to this assessment. *It was too late to be effective.*

Allman *vs.* District of Columbia, *supra.*

The jury had done its work, and been dismissed. No memorial had been made of the evidence taken before them, if any such there was. The court was without power to correct error, if error there were, in the finding of the jury. It could confirm or reject the verdict of the jury, and there its power stopped. Hearing, in the legal sense of the term, there could not have been before such a tribunal. The term imports power to correct error; to prevent injustice. *No hearing* is the precise equivalent of a hearing before a tribunal without the power to determine.

The appellants argue that the act expressly required the assessment of benefits against the land of the appellees abutting on the part of the street donated by them; and that they must be classed with the list of owners, described in the statute "of pieces and parcels of ground situate and lying on each side of the extension of said streets." Such a

construction is not warranted by the language of the act. It provided for the opening and extension of S, Twenty-second and Decatur streets, through lots 41 and 42 of a tract of ground described as Phelps and Tuttle's subdivision. The assessment was to be made on land lying on each side of the streets *extended*. That is, through the land lying on each side of said streets, in said lots 41 and 42, as described in said act. The streets were not to be *extended* through the Kall tract, within the meeting of the act. The act was to be operative only upon the dedication by the owners of the Kall tract, of the land lying within the limits of the streets to be extended; and while the appellees may have had knowledge of the existence of said statute, and of its provisions, such knowledge has never hitherto been regarded as the legal equivalent of notice. There are only two modes known to the law by which notice can be given; one is by personal service upon the individual to be affected, and the other is by advertisement; and where the law requires notice at all, these are the only two ways by which it can be given. Where notice is required by law, and the mode of service is not specified, the law requires that it shall be personal.

> Chicago & Alton RR. Co. *vs.* Smith, *supra.*
> Pennoyer *vs.* Neff, 95 U. S. 719.

There is no pretence that there was any personal service in this case, until after the jury were discharged, and no reason is disclosed in the record, why such personal service may not have been made prior to the assessment, as well as afterwards. As was well said by Mr. Justice Morris, on this point, in delivering the opinion of the court below:

> "There is nothing in the suggestion that the proceedings were directed by the statute to be had in the Supreme Court of the District, sitting as a District Court of the United States, and that such process would thereupon be sufficient as was appropriate

in a District Court, which would warrant the substitution of a notice of publication in the place of personal service of process. The District Courts of the United States do not proceed by notice of publication instead of personal service of process, any more than do other courts, except where they act as courts of admiralty; and even then, though their proceedings are substantially *in rem*, rather than *in personam*, they can scarcely, in view of the circumstances, be regarded as exceptional. If they were, they would afford no warrant for the present proceeding, for the District Court has much other jurisdiction than that of admiralty, in which notice of publication is not to be thought of for a moment as a legal substitute for personal service of process. Notice of publication in modern practice is a purely statutory device to enable the courts of justice to reach property within their jurisdiction when the parties in interest are beyond their jurisdiction, and can not be reached by personal process, the ordinary common law and inalienable right of all persons under ordinary circumstances.'

It is respectfully submitted, that in any view that can be taken of the point under discussion, there was no such notice in the case, as constitutes due process of law.

III.

By proper construction of the statute authorizing the condemnation proceedings, the jury were not warranted in assessing benefits against the Kall tract.

The statute under which these proceedings were taken required appellants to dedicate so much of their land, known as the Kall tract, as was embraced within the limits of the streets to be extended. In compliance with this requirement, appellants contributed 77,925 square feet of ground, contiguous to and adjoining that condemned, on the west, for street purposes. The land belonging to Mr. Leroy Tuttle, lying within the limits of Decatur and S streets, aggregated 33,428 square feet, less than one-half the area of

that given by appellants, under the requirements of the statute, for street purposes. The jury found the value of the land taken from Mr. Tuttle to be $52,000, and they awarded him that sum in bulk; which is at the rate, on the average, of a little over $1.54 per square foot. Fifty per cent. of this sum, or $26,000, they assessed upon the property supposed to be benefited by the opening and extension of said streets. Against Mr. Tuttle's property they assessed as benefits the sum of $10,000, which, deducted from the amount awarded, leaves the net sum of $42,000, money actually paid to Mr. Tuttle as the result of these condemnation proceedings. Of the residue of said benefits, they assessed the sum of $14,000 against the Kall tract. The land donated by appellants was worth at least two-thirds as much per square foot as the contiguous land belonging to Mr. Tuttle; so that the net result of the condemnation proceeding, as worked out by the jury and the court, seems to be that the appellants, in order to have the street opened, were obliged to donate to the public, lands of the value of at least $80,000, and to help pay for the lands condemned, an additional sum of $14,000, thus making a total of $94,000 contributed by them under this statute for the purpose of securing the opening of these public thoroughfares; while Mr. Tuttle, whose land joins upon theirs, is paid the sum of $42,000 for land which is less than one-half the area, and but little more than half the value of that dedicated by the appellants. The interpretation of a statute that worked such a practical result can hardly commend itself to the conscience or judgment of the court.

Statutes should receive such a construction as will, if possible, avoid an unjust or absurd conclusion.

Law Ow Ben *vs.* United States, 144 U. S. 47.

Church of the Holy Trinity *vs.* United States, 143 U. S. 457.

Henderson *vs.* Mayor of New York, 92 U. S. 259.

United States *vs.* Kirby, 7 Wall. 482.

Otis *vs.* National Bank, 100 U. S. 239.

It is the duty of the court to discourage any construction that will lead to absurd results.

United States *vs.* Kirby, *supra.*

A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.

Jackson *vs.* Collins, 3 Cowen, 95.

IV.

The Kall tract comprises several acres of ground, of irregular outline, only part of which is assessed with benefits. The parts so assessed are inaccurately and insufficiently described, and the assessment is void for that reason.

The assessment, in order to be valid, must clearly mark out and identify the property, so that the court can determine, upon inspection, the outlines of the property embraced in the assessment.

In the case of Green *vs.* Lunt, 58 Me. 533, the court thus states the doctrine:

> "If there is no definite parcel taxed, there can be no lien, and if no lien, there can be no legal sale; hence the inference is irresistible that, in the assessment which establishes the lien, and which is the foundation on which rests all the subsequent proceedings, the lots taxed must be definitely and distinctly described" (p. 533).

The case of Rokendorff *vs.* Taylor's Lessee was a case that went to the Supreme Court from the Circuit Court of the District of Columbia. One of the points in the case touched the sufficiency of a notice of sale by the collector of taxes of the property in controversy, which described the property as "one-half of Lot 4, in Square 491;" the other half was advertised at the same time, under the same description, as belonging to other parties. The court held that the notice was radically defective.

4 Pet. 362.

One of the points in the case of Bensinger *vs.* District of Columbia was as to the sufficiency of the description of a lot assessed for taxes. The lot was assessed in the name of its owner. The number of the square was given, and the lot was described as "of Lot 2." There were other elements of description added from which the court might have figured out the location of the lot and its area; but it held that the description of the lot was inadequate for want of certainty of description.

6 Mackey, 287.

This case was followed in McClellan *vs.* District of Columbia, 18 D. C. 94.

See, also, in this connection—

Secs. 242 and 243, 1st Blackwell on Tax Titles, and cases cited.

The rule of construction applied in the interpretation of a deed conveying land, between private parties, or relating to the construction of a contract for the purchase or sale of land between private persons, does not apply to assessments; a description which would be adequate in the one case would not be sufficient in the other.

In the case of assessments it is always a question of fact, and not of intent, and a defective description can not be helped out by parol evidence, showing what was the purpose of those charged with the execution of the law. The case of Orton *vs.* Newman is illustrative of this distinction. In this case the plaintiff relied upon a tax deed in which the property was described as "part of the N. W. ¼, Lot 3;" then followed other terms of description. The court held that the words "being known as" or "described as" could not be supplied between the letters and numerals "N. W. ¼" and "Lot 3," and that the deed was for that reason void for uncertainty.

23 Wis. 102.

De Lorme *vs.* Ferk, 24 Wis. 201.

The assessment in this case covers only a portion of the tract of land owned by appellants. The verdict of the jury attempts to set out, by metes and bounds, courses and distances, the several pieces assessed; but it omits in each of the pieces of property assessed, the proper designation of the courses. In every case it uses numerals to designate the courses, but whether degrees, minutes or seconds are meant, is not indicated; the numerals and punctuations are placed in such a way, as to make it impossible to determine whether degrees, minutes and seconds are meant, or degrees, and fractions thereof, or minutes and fractions thereof are intended; and the verdict contains no reference by which this omission and indefiniteness can be corrected.

The description of the first piece sought to be assessed is further defective, in that it does not show at what angle the third line in said description leaves the second line of the outlines of said tract; nor is the course of said line given; nor does the description state whether said line intersects the westernmost boundary line of said Kall tract, or whether it stops short of it; and while obviously, only a part of the tract is assessed, what part, is left in doubt and uncertainty (Rec., p. 8).

V.

The award of damages and finding of the jury is, as to the Kall tract, excessive, unjust and unreasonable, and ought to be set aside for that reason.

Considering the various assessments of benefits, in connection with the pieces of property upon which they are made, and the relative position of other property in the vicinity, it is clear that gross inequalities are found in the verdict in respect to the apportionment of benefits. Lots two (2) to five (5), both inclusive, in Block thirteen (13), Kalorama Heights subdivision, are each assessed $100; the remaining lots to the west, fronting on the same street,

which, while perhaps all are not equally benefited, are certainly benefited by the opening of said street, eastward, are not assessed at all; so with Lots twenty-five (25), twenty-six (26) and twenty-seven (27), in Block twelve (12) of said subdivision, they are assessed $100 each, while those to the west, adjoining, are not assessed at all. The inequality of the verdict is more apparent when the assessment placed upon the second piece of the Kall tract is considered, and that piece is compared with the contiguous property fronting on Decatur place. This tract of ground is assessed $5,000 in benefits; while Lots one (1) to eleven (11), both inclusive, in Block twelve (12), Kalorama Heights, which are certainly benefited by the opening of Decatur place and Twenty-second street, are not made to bear any part of the burden incidental to the opening of these streets. All of these last-named lots, as well as Lots from twenty-one (21) to forty-four (44) in said subdivision, abutted upon a blind street, until the extension of Decatur street; each and all of these lots were certainly benefited to a very appreciable degree by the dedication and opening of the streets in these proceedings described. The same is true of Lot twelve (12) in Block ten (10) of said subdivision; it is not conceivable that this is not benefited at all, while the lot adjacent to it on the north (the last piece of the Kall tract described in the verdict of the jury) is assessed for $2,000. It is submitted that the finding of the jury in this regard is unjust and unreasonable, and that the verdict ought, on this account, to be set aside.

It is respectfully submitted, that upon any proper view to be taken of this case, the judgment of the court below is correct, and ought to be affirmed.

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